Exhibit B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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KATHALEEN FREEMAN, ET AL., :

Plaintiffs, :

-against- :

HSBC HOLDINGS, PLC, ET AL., :

Defendant. :

- - - - - - - - - - - - - - - X

18-CV-7359(PKC)

United States Courthouse
Brooklyn, New York

February 5, 2024
2:30 p.m.

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE VIA VIDEO
BEFORE THE HONORABLE PAMELA K. CHEN
UNITED STATES CHIEF DISTRICT JUDGE

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THE COURTROOM DEPUTY: Civil cause for status conference. Docket 18-CV-7359, *Freeman, et al. v. HSBC Holdings PLC, et al.*

Before asking the parties to state their appearance, I would like to note the following:

Persons granted remote access to proceedings are reminded of the general prohibition against photographing, recording, and rebroadcasting of court proceedings. Violation of these prohibitions may result in sanctions, including removal of court-issued media credentials, restricted entry to future hearings, denial of entry to future hearings, or any other sanctions deemed necessary by the Court.

Will lead counsel for each party state their appearance, starting with plaintiffs.

MR. RADINE: Good afternoon.

This is Michael Radine from Osen LLC on behalf of plaintiffs in the *Freeman* actions.

And I am joined today by Gary Osen, Ari Ungar, Aaron Schlanger, Dina Gielchinsky.

THE COURT: Okay. Good afternoon to all of you.

And then next we have Standard Chartered Bank?

MR. FINN: Good afternoon, Your Honor.

Andrew Finn from Sullivan & Cromwell on behalf of Standard Chartered Bank.

THE COURT: All right.

And then who else do we have here? I don't know, actually, all the defendants who are present.

MR. BOCCUZZI: Good afternoon, Your Honor.

Carmine Boccuzzi, Cleary Gottlieb, for Defendant Commerzbank.

THE COURT: All right.

MR. TOMAINO: Good afternoon, Your Honor.

This is Michael Tomaino with Sullivan and Cromwell for Defendant Barclays.

THE COURT: Good afternoon.

MR. HAMBURG: Good afternoon, Your Honor.

Robert Hamburg of Mayer Brown for the HSBC defendants, along with Mark Hanchet, also of Mayer Brown.

THE COURT: And, Mr. Hamburg, you are representing? I apologize.

MR. HAMBURG: Sorry. We represent the HSBC defendants.

THE COURT: Okay. All right.

And Mr. Tomaino, or Tomaino -- I apologize if I'm mispronouncing it -- you represent?

MR. TOMAINO: Defendant Barclays.

THE COURT: Thank you. Okay.

MR. COHEN: Good afternoon, Your Honor.

Marc Cohen for the Credit Suisse defendants.

THE COURT: Okay.

MR. HOUCK: Good afternoon, Your Honor.

Robert Houck for Royal Bank of Scotland defendants.

THE COURT: Anyone else?

MR. CHAREST: Your Honor, Daniel Charest here on behalf of the *Stephens* plaintiffs.

THE COURT: All right. Yes, I remember you, Mr. Charest.

It's a bit like a very expanded Hollywood Squares. It's kind of hard to find everybody.

All right. So we're here so I could talk through the various motions that are pending with everyone. It seems like a more efficient way to deal with the issues that are swirling about rather than through written submissions.

As I see it, there are essentially three issues over motions that I want to address and then I shall open the floor to any other issues that the parties want to discuss.

The first one is this request by plaintiffs to constructively subpoena themselves.

The second issue has to do with whether to stay discovery. And with respect to that issue, I do want to make one observation, although ultimately I think it might be irrelevant or moot. But as far as I see from the docket, the stay, in effect, had ended back in May of last year because the last stay I had issued on discovery was based on a decision being issued in the *Twitter* case and I think that

happened back in May. So in effect, albeit without any court order or anything, it seemed to me that, had any party wanted to proceed with discovery, they could have as of May 2023.

But as I said a moment ago, I think that might be moot, given that now we have a motion to dismiss pending and so discovery probably will have to be stayed pending some resolution of that and also pending what is this discovery issue about the constructive subpoena or whether or not there might be some other way in which discovery should happen with respect to the information that plaintiffs want to get that were produced in the *Bartlett* case.

So let me at least give you my preliminary thoughts on all these issues and then I will open the floor and have more discussion. And we will probably start with the plaintiff since obviously they are the moving party here, or they're obviously the initiator of the lawsuit.

I will say this, Mr. Radine and Osen and company. I am not going to grant your request to file a -- or to constructively subpoena yourself because, you know, there's really no such thing. I do agree with defendants on that.

And secondly, to me it would end up being an end run around the protective order that exists at Barclays. I mean, if parties who are subject to a protective order in one case get certain information pursuant to the protective order that bars them from using it outside of that case, then go and

constructively subpoena those in another case, it seems to me you've avoided the intended restrictions in the other case that Judge Amon is presiding over along with Magistrate Judge Merkl.

So I think that that would be wholly inappropriate, in part because I don't think there is such a vehicle under the rules. And secondly, here it would allow you to do something that the *Bartlett* judges have not approved on, which is to, in effect, get materials that are subject to a protective order there.

Rather, I think what you can do though is subpoena the same records from the same parties, Standard Bank, which is obviously a defendant here, and then KCB, a nondefendant or third party here. You could subpoena them and then we would deal, as we would in any other case, with any discovery disputes that arise out of those subpoenas.

And I think the other reason this is appropriate is because not knowing anything about the *Bartlett* case other than that there are similar allegations with many of the same plaintiffs, I don't know if there are any grounds -- and I'm going to ask Mr. Finn this question -- if there are any grounds to move to quash such a subpoena in this case or any reason to think that that discovery, the same discovery that occurred in *Bartlett*, would be inappropriate or should be precluded in this case. I can anticipate in my own mind some

arguments, some of which have already been suggested. But I also don't know whether the scope of any production of discovery would be exactly the same.

So I think to avoid, you know, any question that somehow you're running afoul of the *Bartlett* protective order and I think to avoid having to go back to Judge Amon and to Judge Merkl on this issue about whether they would lift that protective order, because the last ruling was really based on the fact that discovery had not restarted here, I think rather than get caught in that loop again, we should just deal with it, in this case, with a straightforward discovery request subpoena for one party or discovery request on the defendant party for that same information.

So again, this is all by way of preliminary remarks. So let me go then to what that leads me to with respect to the other outstanding issues.

In terms of the stay of discovery, as I said before, I think it was, in effect, lifted before. But I do think there is a need for there to be a stay of discovery now if -- and this is assuming there is other discovery besides the discovery that the plaintiffs want from SCB and KCB. And I realize that there is an argument that -- well, I don't know, that there may be some argument on allowing limited discovery just to the plaintiffs for this purpose. But I think because there is a pending motion to dismiss because there has been an

amended complaint filed with redactions -- and I know plaintiffs claim that what is not redacted should be enough to survive a motion -- practically speaking, I don't want to do two motions to dismiss if that's where we end up. I would like to resolve this discovery conundrum first in the manner that I suggested, which is to simply have the discovery and subpoena request made in this case of the relevant parties and then any discovery disputes to be resolved by me in this case with respect to those documents. And then once we see where that lands, we'll know what the contours of this amended complaint look like, whether they are solely what is not redacted or whether or not the redactions now will be allowed to be part of the amended complaint for purposes of briefing the motion to dismiss. And to me, that is the most orderly and efficient way to proceed.

And so, that answers then the third question of the motion to dismiss, which obviously can be filed at some point and likely should be filed based on what I know about the case already. And I say "should," meaning that the defendants should have an opportunity to brief that. But I think -- I mean, I know I don't want to have to deal with potentially two rounds of motion briefing on the dismissal issue.

So, with that somewhat likely preamble, let me turn to Mr. Radine for the plaintiffs.

MR. RADINE: Okay. Thank you, Your Honor. This is

Mike Radine for plaintiffs.

I think what Your Honor described makes sense.

Just by way of very brief background, our conception of subpoenaing ourselves was intended to create essentially a burdenless discovery device since we were in possession of the records already. We're not opposed to requesting, making requests on Standard Chartered and on KBC. At this stage, we're not seeking anything beyond what essentially underlies the redacted allegations in the complaint. We would wait for post motion to dismiss discovery for the, you know, more large-scale discovery.

KBC has consented to our use of its records in this case, but I understand under what Your Honor was describing; Standard Chartered would make its objections and the Court could review those. That makes sense. And I think that's in line with Magistrate Judge Merkl's order, who made her order without prejudice, pending a discovery order in this case. So I think that dovetails there.

So I think on a relatively short schedule we can prepare the requests since, again, it doesn't go beyond the limits of what's in the complaint. And if Your Honor were to grant, assuming Standard Chartered objects, which I think it's indicated it would, that the discovery is appropriate, all we'd be seeking now is to file the unredacted version of the complaint under seal. It is certainly fine with us. And then

that's what the Court would review for the anticipated motions to dismiss.

THE COURT: Okay. All right. That sounds fine.

The one thing I will add is that even though KCB has consented to your use of the records, which obviously could be a factor in *Bartlett*, the Court also really would have to decide whether or not the protective order either should be lifted or that an exception should be made. So the consent, while certainly something that I think that goes a long way to having the protective order modified in some ways, doesn't obviously answer the question in full, which is why I think we should just deal with a whole different line of discovery in this case rather than going back to the *Bartlett* well, if you will.

So let me hear first from Standard Chartered Bank.

Is it correct that you intend to object to a motion -- here it would be a discovery request to your client to produce essentially the same records that were produced in *Bartlett?*

MR. FINN: Thank you, Your Honor.

Yes, we would absolutely object.

I think what might need some clarifying here, Your Honor, to start with is how we got to where we are today in this case. If Your Honor will recall, and I will say we had to go back all the way to 2015 and before when this, the

predecessor case, *Freeman I,* was before Judge Irizzary and Judge Pollak and even this case before, I believe, Judge Cogan at one point. But you know, how this played out is we had the *Freeman I* case, we had a stay of discovery pending a motion to dismiss there, which obviously that lasted, you know, quite a long time given all the briefing that occurred in the transfer of the case to Your Honor. *Freeman II* and the *Bowman* case were filed as kind of follow-on cases, same substantive allegations, an additional set of plaintiffs. And the discovery had been stayed in that case since the very beginning. And there was a request back in, I believe, 2019 to lift that stay. The Court denied that as the Court was just about to issue its dismissal order with respect to *Freeman I*. And what we did, and I think this was on with consent of the plaintiffs, is we proceeded to a summary motion to dismiss process thereafter in *Freeman II* and *Bowman* during which there was a complete stay of discovery in all other proceedings.

Standard Chartered and all of the other appearing defendants were dismissed in 2020 from the *Freeman II* and *Bowman* cases. So we've never had discovery. And I think the parties had always been proceeding on the fact that, whether you call it a discovery stay or just there's no authorized ability to do discovery, because all of the appearing defendants had been dismissed from the cases four years ago.

And so on that basis, we proceeded. And as we know, the plaintiffs in *Freeman II* and *Bowman* sought to amend their complaints, never seeking discovery for that purpose to amend their complaints.

And then we got into this issue with *Bartlett* whereby the plaintiffs tried to do, as I think Your Honor correctly noted, an end run around the fact that otherwise you wouldn't get discovery in order to amend a complaint, particularly after a complaint has long been dismissed against the party.

So the only reason we're really talking about these, you know, redactions and seeking materials from Standard Chartered is, in fact, the plaintiffs in this case went ahead, notwithstanding rulings from Judge Merkl and later Judge Amon with respect to the permitted use of materials that Standard Chartered produced, and went ahead and used that material. And they now say it would be helpful to their case here and, you know, they've put it in a redacted form in the complaints -- the complaint that they filed.

So we think that it would be entirely improper to engage in discovery, putting aside the fact that we're only here because of this workup procedure whereby the plaintiffs, in our view, misused material in *Bartlett* before they had permission to do so and, in fact, later that permission was expressly denied.

And then, you know, putting the background law at issue here in terms of -- let's just put aside whether we had this *Bartlett* dispute which lasted, you know, lengthy proceedings before Judge Merkl and Judge Amon. Putting that aside. As we noted in our letter to the Court, you know, Courts in this circuit have consistently held that discovery requests that are lodged for the purposes of extra information in order to try to use an amended complaint is not proper. And the Second Circuit, as we noted in the *Mainstream Legal Services* case, has said a plaintiff who has failed to adequately state a claim is not entitled to discovery. And here, we have a very clear example because it's not just that we're sort of sitting with a complaint against us in this case and therefore there might have been some expectation of potentially discovery. In this case, *Freeman II* and *Bowman*, now I guess just *Freeman II* based on the consolidation order, we never had discovery because the Court ruled years ago that the plaintiffs had not stated a plausible claim.

And so we think in putting aside the procedural intricacies of how we got here, we think if this were just any other case, before the plaintiff can engage in any other discovery in order to bolster an amended complaint there would need to be really extraordinary circumstances, circumstances that we've found where Courts allowed that in something where there's a jurisdictional question and the Court may say: I

need to resolve this factual issue on the pleadings and I will allow some discovery on the jurisdictional issues.

But that's not what we have here. As the plaintiffs stated in their letter, their pleading doesn't, I think their quote was "depend" on these redacted allegations and that these are -- you know, I guess they think is just additive.

So you know we think it's extremely unfair now to engage in discovery and improper under how normal procedures of the Federal Rules of Civil Procedure are supposed to operate to engage in any discovery.

And I think added to that is the fact that Standard Chartered Bank, and I think speaking for some of the other appearing defendants at least, would like to move this proceeding along. You know, we have been dismissed. We thought we were dismissed four years ago because of the Court's order, and obviously the Court has allowed the plaintiff to amend. But we think it's entirely improper and will only delay motion practice on the threshold pleading requirements of an aiding-and-abetting claim, particularly in light of the Supreme Court's ruling in *Twitter* to engage in what would essentially be, you know, extraordinary party discovery of Standard Chartered Bank all because, in our view, the plaintiffs here respectfully misused material they obtained in the *Bartlett* case.

Sorry, Your Honor, I think you're on mute.

THE COURT: Sorry. I was trying to prevent some of these computer alerts from disturbing your statements.

How did they misuse the information, in your mind?

Because I am not allowing them, obviously, to make allegations based on it.

But are you saying that even if they were trying to prop up or sort of amend using it based on their knowledge of it and then asking for it to be produced in discovery, is that misuse in your view?

MR. FINN: Yes, Your Honor, we think it is.

And, you know, what Judge Merkl found in terms of interpreting the protective order is -- in *Bartlett* is, what we viewed it as saying, which is that material, discovery material in that case, as she said I think on September 27, shall be used solely for purposes of conducting that litigation, the *Bartlett* litigation.

And so what the plaintiffs here did is they took what was essentially tens of thousands of confidential banking records that Standard Chartered produced as a third party in that case, mined them for, you know, whatever they thought might be useful for this case and then proceeded to put together allegations and then redacted them in a complaint. And now they say they're useful, those allegations are useful to their amended complaint and therefore the Court should obviously initially engage in this, what we think is also an

improper constructive subpoena procedure or otherwise, since they already have used it and mined this data and think that they have something useful there that might be relevant to their complaint, that the Court should then go ahead and basically bless that, you know, what they've already done and allow them to, you know, engage in a document -- ask us, as a document request, to produce those tens of thousands, you know, banking transaction data that we produced in *Bartlett*.

So, you know, in that way they've already, in our view, you know, misused the material. They really -- I mean, Judge Merkl ruled in September that they could not use this material for this case under the *Bartlett* protective order.

Now, obviously they appealed that to Judge Amon, but apparently they went ahead and did it because that's what's in the forty-some pages of redacted allegations in the amended complaint here.

THE COURT: Well, hang on. Two things though. I don't mean to quibble too much with you about what might seem like a semantic issue, but I do want to understand.

Are you saying that knowing that this information exists -- the plaintiffs, that is -- if they had merely said, Your Honor, based on that, we would like to reopen discovery or, you know, lift the stay in discovery in this case, in our case, and issue the discovery requests that I'm proposing they do, would you consider that a misuse of the information?

And there, they're just using their knowledge of that information to then further discovery requests. Putting aside your issues about the timing, the dismissal of the claims, et cetera. Is that what you mean by even that would be misuse, as opposed to putting it in a complaint?

Because I will say this. The latter I don't consider misuse just yet because it really hasn't come to fruition. I mean, it's sitting there under, you know, blackout, so that's not using it, in my opinion.

But I think what you're saying is that even taking the knowledge of it to try to then obtain it through constructive subpoena or by, if they follow my suggestion, a straightforward discovery request here, would be considered misuse.

MR. FINN: Yes, Your Honor, that's right.

THE COURT: Okay.

MR. FINN: I think it would be different -- what sometimes happens in scenarios of parties seeking amendment of a complaint, as the Court is aware, sometimes they -- after the Court issues a ruling granting a motion to dismiss perhaps without prejudice the plaintiff says, you know, I could -- I know that X, Y, and Z exists, I think this would save my complaint, you know, please grant me some discovery before we proceed. Now, even that is a high bar under Second Circuit law to get that type of discovery, as we've cited several

cases saying that the general rule is that's not permitted.

But I do think that given the way that this transpired, you know, it is -- it's one thing to say that, you know, the plaintiffs here understand that Standard Chartered Bank is a large correspondent bank and, you know, may, if they proceed in discovery, seek discovery of Standard Chartered Bank, given we're a defendant here. But it's another to be able to use already the material that they have obtained in *Bartlett*, mine that material -- again, tens of thousands of transactions -- and come up with allegations for this case, which has already happened here, and then use that as, you know, well, now I can -- I have a basis -- I mean, I'm not sure what the basis, frankly, is, but, you know, now we can somehow -- you know, now we're entitled to party discovery in a case that's been dismissed against Standard Chartered Bank for four years in order to I guess somehow bolster this lengthy complaint.

THE COURT: Right.

Well, here's my concern, is that I think the Court in the procedural posture that we're in that you reference really cuts the other way. Because you seem focused on the fact -- and do I agree with you that it seems anomalous to say, well, somehow we're going to bring back to life claims that have been dismissed by information now that the plaintiff is about to discover. And I use the word "discover" mostly in

the technical sense, but here it's slightly different, I think, than the cases that you cite in that the plaintiffs already possess the information. So there's really no fishing expedition going on, I mean, in terms of the misuse, for them to take advantage of their knowledge of the existence of the documents. Fine, I guess your argument is still the same.

What I think the Court can posture could have -- the procedural posture could have gone the other way in just I think the timing as between the two cases. If the dismissal process had moved faster in this case -- and you know better than anyone, it took longer than it should have for the initial motions to be dismissed -- to be decided. Sorry, the initial motions to be dismiss to be decided. Because it was with Judge Irizzary and then Judge Pollak issued the report and recommendation not to grant the motion to dismiss, and then the case was reassigned to me and I overruled that. So it took a longer period of time than usual for us to fully resolve the motion to dismiss, and then, of course, I think that was appealed. And so it's been a very long trajectory for all of that.

If the case had followed a more normal track, it seems to me possible -- well, I guess it could cut the other way. I guess the information, what I was thinking is -- but putting that aside, I guess the information couldn't have been discovered by plaintiffs from the early stages of this,

revived them and amend based on information they didn't have, or don't still have, I should say, formally. It seems to me a quirk in the timing, just as you say.

And I think to me it doesn't necessarily go to the fairness or unfairness. It just go goes to the unfortunate set of circumstances from the plaintiff's point of view. But what I'm concerned with is the reality, which is that this information exists, it was provided by your client in another case to the same lawyers and plaintiffs, and the plaintiffs claim that it could be, and for them to allege a valid aiding-and-abetting claim, and a pretty serious one at that.

And so I am somewhat loathe to simply give it the back of the hand and say, well, it would be unfair because the claims were already dismissed once, because I don't think that plaintiffs have failed to act diligently. I mean, once they got the information, they did pursue it. And the information does exist.

So it almost seems as if I should at least look at it and see if I agree that this information, which was provided voluntarily by your client at some point, albeit in a different context but for the same forum as plaintiffs, really does breathe life back into their claims.

That's my concern. It just seems to me justice more requires me to look at what exists rather than rely or vaunt, I guess, procedure over substance.

MR. CHAREST: May I be heard? This is Daniel Charest for the Stephens, Your Honor.

THE COURT: Yes.

MR. CHAREST: I was at the risk of arguing when it seems like we're on the right trajectory.

All of those arguments about the case had been dismissed and, you know, the Second Circuit law and all that, first off, no one denies it's fully within the Court's discretion and that is just the fact.

Number two, all those arguments don't apply to us anyway. And we didn't get the dismissal. We've been stayed the whole time. You know, and so we come to this without that burden.

And we're for sure going to serve, if the Court allows it, discovery on Standard Chartered, just going to track exactly the same things. So we're going to do it for us anyway.

And I think the Court's instinct of why don't you just -- you get me the facts, you make your allegations, and I'll call it straight up, you know, what are we talking about here other than that?

You know, that's where I come from. So, thank you.

THE COURT: No, I appreciate that, Mr. Charest. And it is a straightforward way of looking at it. And perhaps over simplistic in certain ways, but I feel like it's grounded

in a certain reality, which is, this material exists and this claim, it really bolsters their, you know, previously vulnerable and inadequate aiding-and-abetting claim. I'd like to see it, you know, at the end of the day. Even though I understand and I am not being dismissive, Mr. Finn, of your argument. I may well agree with you that there is a) as a matter of substance, there's still a reason to dismiss the claim, or b) that you're right that somehow they shouldn't be allowed to use it. And so you're not going to be prevented from making those arguments. But I think in the first instance, we should let the actual discovery go through in a straightforward way. And I won't have to rely on the *Bartlett* protective order per se because it seems to me perhaps a bit besides the point. And quite honestly, I suspect if I talk to Judge Merkl and Judge Amon and say, listen, now I've decided I'm opening discovery and they're going to -- I mean, it seems almost apples and oranges. I would say I'm opening discovery, which -- but I'm not going to allow the plaintiffs to constructively subpoena themselves because I don't think that that's a real thing. And then it almost seems to me it's irrelevant whether there is a protective order. I mean, I guess it's where a come out. Okay, so what, there's a protective order in another case for the same information. Unless I buy your argument, Mr. Finn, or unless I guess you want to present the argument to Judges Merkl and Amon that

even using their knowledge of this information to subpoena the same records in my case runs afoul of the protective order. I mean, I guess that's the one argument that I would have no say in. And even if you presented it to me, I would feel like that's not my call. So it feels to me as if you -- if you want to pursue that argument, you should probably, as I'm thinking about it now more, bring it to Judge Amon and Merkl, so it seems to me. I mean, I don't know if that's what you intend to do or if you want to make that argument before me. But I think I can forecast for you that I don't think I'm in a position to decide if that definition of "use" violates the protective order. I don't think it would be appropriate for me to decide it or to preclude the discovery in this case on that basis.

So it seems to me -- and I hesitate to say it because I think I'm creating more work for you, but it seems to me in the first instance you might have to go back to Judge Merkl and Amon to see if they agree with you that even if trying to subpoena it separately, even if plaintiffs try to subpoena the same records from your company separately, that that would violate the protective order in *Bartlett*.

If I were to hazard a guess, I would probably say they would say no, but I don't know enough about the case in that regard.

MR. CHAREST: And not to pyle on -- this is Daniel

Charest for the Stephens plaintiffs again -- that also wouldn't affect our claim, our rights anyway. We're not party to that protective order. I know pretty much about as much as the Court does about what the documents say, but I sure as heck want to see them.

THE COURT: But here's the problem, I suspect. You may be derivatively tainted because you know only about them because I assume *Freeman-Bowman* counsel, Mr. Radine and his colleagues, have told you about them, right?

MR. CHAREST: I mean, nothing more than what's been said in open court.

THE COURT: Right. Well, yes, but you can't use what you haven't seen. Because you haven't seen what is behind the redactions, I assume?

MR. CHAREST: Correct.

THE COURT: Okay.

Yes, I mean, I think unfortunately, now that you mention it, I think you're in a bit of an odd position. I think though still there's a ruling about whether or not the mere knowledge and then attempt to use that knowledge of the information violates the protective order, you probably can't use it either because the source is still -- you know, the source of it is still under some protective order.

So I don't know, Mr. Finn, if you've played this out in your mind. Would you go back to Judges Amon -- you're

counsel in that case, too, for SCB, right?

MR. FINN: Yes, Your Honor.

THE COURT: Yes.

Would you go back to Judge Amon and Merkl and ask them if your theory about misuse is consistent with their understanding of the restrictions of the protective order?

MR. FINN: Well, we would hope to avoid that, Your Honor, frankly. We did litigate the issue for probably over six months or so.

THE COURT: Yes.

MR. FINN: And got a ruling that they weren't permitted to use this material.

Your Honor, I think without sort of revealing what the information is, it really isn't just as straightforward as, you know, the plaintiffs -- the *Freeman* plaintiffs' lawyers got a document and now they want to allege something about that document. What they obtained -- and the only real course here on this is that they happen to have the same counsel and there's crossover of some of the plaintiffs between here and *Bartlett* is -- is transaction action records of tens of thousands of banking records. These are spreadsheets with thousands of people's names and entities' names. They then took that and apparently mined that with I don't know who. But they went ahead and mined that and then put together allegations for this case.

We've actually seen, because we asked the plaintiffs' counsel to show us the stuff that came from Standard Chartered Bank's materials, and, you know, again, without sort of describing it, exactly what it is, it is not a straightforward we just took a document or an e-mail that we obtained here and we want to allege something about it over here in this case.

Much more extensive than that, we actually also think that if it were put before the Court it would demonstrate that it, in fact, doesn't change whatsoever the merits of the alleged complaint here. It actually, in our view, has nothing to do with the -- you know, with the claims at issue here.

But putting that aside, I mean, the quirk here is really that we have plaintiffs' lawyers and plaintiffs' counsel that overlap. And I understand they can't unlearn what they learned in case one, but that's why we have protective orders in place, that you're really not supposed to use it. And in our view, you know, they've already used it.

I also am mindful that we really don't want to burden the Court with additional motion practice on this. We really would like to get it forward with, get moving with the motion to dismiss. You know, I haven't -- we haven't conferred with plaintiffs' counsel, but, you know, perhaps there is a way, you know, recognizing the Court is a little

bit hamstrung here because the Court actually hasn't seen what the materials are --

THE COURT: Right.

MR. FINN: -- what the proposed allegations are --

THE COURT: Here is what I'm thinking. And I don't want to cut you off, but, I mean, I would like to streamline this process. I think we all would.

And I appreciate the fact that you went through prolonged litigation in the *Bartlett* case to sort out this protective order issue. And although the plaintiff was prohibited from using the information, as I understand it was because I think Judge Merkl recommended to Judge Amon and she adopted it, that it was because discovery was stayed here. That's what I understood was the reason. There wasn't a determination about the protective order itself and what it restricted and why and whether or not that would preclude any use of it, however you want to define the word "use," but in particular to use it in some way to further this litigation.

I think maybe what makes the most sense is to have the plaintiffs, you know, subpoena KCB.

Also, issue a discovery request to your client, Mr. Finn.

At the same time, I think you should write a letter to Judge Amon or Merkl, whoever you think is appropriate, but to say this issue has sort of come to light again because I am

allowing plaintiffs to conduct additional discover -- or to reopen discovery for a limited purpose or un-stay discovery for a limited purpose.

And I realize it's not the usual setting as in jurisdictional discovery, but it's necessary, in my mind, to most efficiently deal with the pending motions to dismiss, or at least satisfy my curiosity. As you say, I'm in the dark here about this information.

It may well be much ado about nothing and I might agree with you that it doesn't really advance the plaintiffs' case in a way to get it over the hurdle of stating a claim, but I don't like knowing that there is this information out there that could well be helpful, or at least plaintiffs believe it's helpful. And it is there, it has been produced, it's not speculative, and it even physically exists in plaintiffs' possession.

I will then confer, if you are willing to send that letter, with Judge Merkl and Amon about how most efficiently to deal with this, and maybe in some kind of crossover way so that we expedite the decision. Because I would be willing to explain to them that here's my reasoning on why I think the plaintiffs should be able to conduct the discovery, sort of redo the discovery but here, but I can't decide the protective order issue. But if for some reason they think that the protective order was meant to prevent this very kind of use,

i.e., taking advantage of the knowledge of it to subpoena it in another case, then they can make that decision.

But I think they could make it -- I would ask them to make it quickly so that we could get this case moving to some resolution, at least at this point.

That's what I would propose.

And then the motion to dismiss will be deferred until we resolve the discovery issue. And assuming that I get to see everything that's underneath -- or let's put it this way. Depending on how that gets resolved, we'll all know which amended complaint is the subject of the motion to dismiss.

But I will work to sort of close the time delay and gap that existed before because I certainly appreciate that none of us want to, you know, get into another six-month track for resolving, I think, a relatively straightforward issue. But I'm happy to talk it through with Judges Amon and Merkl so that we can come up with some -- you know, now we can overlap the judges as well as the litigants and the lawyers.

Thoughts on that from Mr. Radine or from Mr. Finn or anyone else who wants to jump in here?

MR. RADINE: Yes. Thanks, Your Honor. This is Michael Radine for plaintiffs.

I think that's fine. We can issue a request, you know, in ten days.

Obviously, our position -- well, as Your Honor said, the PO was matter from Judge Merkl and essentially pending this Court issuing a discovery order. I don't think there is a suggestion that the PO was meant to effectively immunize the records from all litigations everywhere, other discovery processes, nor do I think the PO is meant to compel us to pretend, in writing a document request, that we don't know what the documents are.

I think that's efficient for everyone, including for Standard Chartered. We had hoped to, you know, issue a tailored document request that, again, just goes to the allegations in the complaint without having to sort of go through the farce of pretending we don't know what those records are.

THE COURT: I would suggest that Mr. Charest join in that, I guess, because it's going to rise or fall, I think, together. If the protective order prevents you from doing it, then it will prevent Mr. Charest as well, and he might as well at least get his name in there for his clients.

It seems to me, Mr. Charest. I mean, you may disagree with me, but it seems like you can't use the information if the plaintiffs can't, under a ruling in *Bartlett*.

MR. CHAREST: Well, I mean, respectfully, I'm not sure I do agree with that, Your Honor. I'm not sure it's a

fruit of the poisonous tree sort of ruling in civil litigation. That's, you know, I think for -- you know, again, you understand my point there. I don't know the answer to that. I haven't really contemplated it. But I wouldn't necessarily jump into that.

I would say this. If the Court tells the reason why the other judges denied the motion was because discovery was stayed, that goes away. I think it all goes away. And if the Court indicates that, yeah, I'm willing to reopen discovery for this issue, let's -- you know, let's just get moving.

I mean, maybe -- you know, like what we're talking about is how to unravel this knot that doesn't even necessarily exist. You know, we know where the documents are, we can cut and paste whatever subpoena was issued in the other case. And what I would do is, I would set a Request Number 1, quote/end quote, what they asked for, Request Number 2, the production that you made on this such and such a day, period. That was it.

And then whatever we get, they ought to be the exact same, I would think. There's no real burden because they've already produced it once, you know, it's laying around in a PSD file somewhere. And then we can update our complaint as we planned to do in the first place. And then we will get to business.

Again, I do things a lot more pragmatically, I

guess, than most people. But to me, this is as simple as the Court saying you can have discovery on this issue, we issue discovery, they respond, we amend, and then we rule.

THE COURT: You can afford to be a pragmatist in this situation though, you're the plaintiff. So I think the defendants' viewpoints is a little different. I feel like for them it's more like, maybe like Sisyphus or the Groundhog's Day or something, that they keep rolling the same boulder up the hill and, you know, somehow it keeps crashing down on them for reasons unforeseen. But at any rate.

Mr. Finn, I'm most interested to see if -- I mean, you don't necessarily have to agree, but I think if I end up lifting the discovery stay for this limited purpose to allow plaintiffs in the *Freeman* cases and *Stephens* to issue this discovery request and the subpoena request, you will obviously move to quash, I assume, here. But I have to say that if your argument is going to be that it violates the *Bartlett* -- or part of your argument is going to be that it violates the *Bartlett* protective order, you need to also, as I say, run that up the flagpole in the *Bartlett* case. And I will do whatever I can sort of behind the scenes to work with those judges to resolve that in tandem so that we could move this along.

MR. FINN: Your Honor, if I may?

I'm not really sure why, other than the fact that

the *Stephens* case happens to be, you know, sort of on the same track, as why the *Stephens* plaintiffs now have entitlement to discovery because the *Freeman II* plaintiffs' lawyers have put before Your Honor redactions to sort of entice the Court to look into this, what those allegations are.

You know, fundamentally we're sort of opening this Pandora's box of discovery which is not normally allowed. There's been no 26(f) conference. We've been dismissed from these cases for years. Not the *Stephens* case, I recognize that. But we would have moved to dismiss earlier had the case not been stayed due to, you know, all of the other related cases. So, you know, on one, I think opening the door there is not appropriate.

You know, I do think in light of the Court's, you know, indications today that perhaps we can go back and think about an efficient way to do this, you know, perhaps it's before Judge Merkl and Amon. I will say that, you know, the concept that the ruling there was based on the fact that discovery had not started here, you know, that was one factor. But the main factor was -- you know, it's actually in the transcript at page 57 to 58 of Judge Merkl's conference in which she made her ruling. That's at ECF No. 346 in the *Bartlett* case. She said -- you know, because there was actually a dispute there about whether the protective order even applied to this material in terms of limiting the use of

the material for other cases.

And she said, quote: With regard to the language of the order -- referring to the protective order -- as it had been discussed at length, the protective order in this case is very clear. It states that, in Paragraph C, that all discovery materials or any copies, summaries, extracts thereof shall be used solely for purposes of conducting this litigation, including for purposes of mediating or otherwise attempting to settle this litigation, et cetera, et cetera.

The Court went on to find that Standard Chartered relied on that expressly, that limitation in producing the documents there, recognizing that it was the same plaintiffs' counsel and some of the same plaintiffs in this dismissed case. Obviously, we didn't think it was appropriate for, you know, plaintiffs in one case to try to use discovery in case two to try to revive case one. So that was very fundamental to those rulings.

But, you know, putting that aside, perhaps we can come up with, you know, an efficient way. I would suggest that we do it in the context of the *Freeman II* cases, given that that's the parties' and the plaintiffs' counsel who has, you know, access, crossover access to both. And then depending on the Court's, you know, decision with respect to that and if, you know, we do have to involve Judge Merkl and Judge Amon, you know, hopefully -- I need to think about a

little bit the procedure here and whether there is a way to avoid that, frankly, of maybe -- you know, let me think about that, if you will. I mean, mainly to have Your Honor perhaps, you know, take a look at the allegations, you know, in some sort of, you know, in-camera way in order to, you know, consider whether -- you know, whether this is actually something that is appropriate to do or not. You know, that might be one way to streamline this.

But, you know, I think that we're happy to also pursue the path you suggest, which is write a letter to Judge Merkl, I think would be the first stop to -- you know, to say that we think that this was a misuse and a violation of the protective order to use the material in this way, you know, recognizing that the Court here has indicated that it would allow some limited, you know, request for discovery to Standard Chartered Bank covering, you know, the same materials.

I guess the other point I would make is that not all of the materials that were produced in the *Bartlett* case were used, I don't think, although we haven't fully been told which transactions the plaintiffs here used in order to formulate some of the allegations. You know, there was a lot more materials produced there than I think even the plaintiffs here, at least the *Freeman* plaintiffs, you know, are proposing to use. So we would ask that any request be limited and

targeted to only that so that we're -- you know, we're dealing with that set.

You're on mute, Judge.

THE COURT: Yes. Thank you.

In listening to you, I came up with perhaps a way to expedite this that maybe doesn't require you to go back to Judge Amon and Merkl.

Because I think as you rightly point out, it seems like the ruling had two bases, one based more on merit, which was the actual language of the protective order, which presumably reflects the intent of it which is to limit these to these materials solely to that case. Again though, one could quibble, I guess, what is a main use? But your argument is that, you know, you can't use your knowledge of it to try to then get it in another case. Basically, you would need to subpoena it somewhere else. But I could perhaps -- and then the other basis, of course, is that I hadn't opened up discovery yet, so in a way it was a moot issue. I don't know which was the predominant reason or the answer to the question about how "use" is defined under the protective order.

But what I could do instead is simply talk to those judges and say: Here is what is happening. I am prepared to allow them to, the plaintiffs here, to make the requests through discovery and subpoena for the same documents. But obviously I cannot say whether or not you would go against the

protective orders, and can you clarify for me whether or not you believe it would?

You know, I mean, it's no different really than you making the request, other than I probably could get that answer quicker, and simply say, after conferring with them, I don't find it runs afoul of or I do find it runs afoul of the protective order in *Bartlett*.

But I suspect the only problem there is one side or the other is going to want to appeal to Judge Merkl and Amon directly, I think. So I don't know if there is really a good way to avoid it by having me essentially confer with them and figure out what they think and have them give me their thumbs-up/thumbs-down sort of read on whether or not this would run afoul of the protective order or why.

Yes, I mean, I think at the end of the day the better course is really to sort of pursue these simultaneous tracks, in effect, of reopening discovery. But nothing really will be moving forward until we hear from *Bartlett* and then trying to get a clarified ruling in *Bartlett*, whether or not this particular use, if you will, of the information obtained by the plaintiffs in *Bartlett* violates a protective order. And then I guess otherwise, whether or not the Court would modify it, even if it does, to allow them to obtain the information for another purpose in another case.

And then it would probably come back to me and you

would still have the argument that it would be unfair for them to get the information after their claims have already been dismissed, is a separate procedural argument.

MR. RADINE: Your Honor, if I may? It's Michael Radine for plaintiffs.

I do think this might be overcomplicating things somewhat too much. No knowledge is needed of the documents to reissue the subpoena we issued in *Bartlett* to SCB. Mr. Charest could issue it right now and receive presumably the same records. I just, I feel like this is perhaps over-thinking the situation, given that this Court has the power to order its own discovery. I don't think the PO was ever intended to prevent that from happening.

I'm also, I think, hearing from Mr. Finn that the records will -- first of all, the records, according to him, don't improve our chances. It seems like this is burdening a lot of different courts when its simple enough to make his relevant arguments either against the subpoena or in a motion to dismiss where I think they ultimately belong. The question is whether or not they support our claims or not.

THE COURT: Well, I mean, I don't think it's exactly true that you would have -- I mean, this is a strange exercise, but that you would have necessarily issued the same subpoenas or made the same discovery requests. Because the whole point is, and someone could explain this to me better in

terms of the reality, but you didn't know that these bank records would be helpful or you didn't know that they existed.

I don't know how they got produced in *Bartlett*. I assume that was prompted by a discovery request as well. But obviously they were never requested in this case.

And I guess this goes back to Mr. Finn's point, which is that, you know, it is an unusual circumstance where defendants bring a claim based on certain allegations, the case is dismissed and all the claims are dismissed, and then the plaintiff learns about other information that they think will help their case and strengthen their claims and then tries to revive basically the same claims.

So I think the problem, I think -- or what I think the defense is arguing is that it would be unfair because without the other discovery, you would not think to subpoena these, even though you technically could have at any point in time, but you didn't before this case and these claims got dismissed. You know, I think that's why it might be unseemly or unfair.

Moreover, I guess you have most of the plaintiffs, except for I think 50, that are involved in the *Bartlett* case, so they have a cause of action already using the same information against Standard Bank and other entities.

MR. RADINE: Not against Standard Chartered, Your Honor.

THE COURT: Sorry?

MR. RADINE: Sorry.

You were right that all the *Freeman II* plaintiffs are in *Bartlett,* but there is no overlap of defendants whatsoever.

THE COURT: Oh, I see. So Standard Chartered is not a defendant in the *Bartlett* case?

MR. RADINE: Right. It would essentially be escaping the import of these records.

But I do think the subpoena is not a sort of far cry. Both cases say that a set of banks had provided material support to Hezbollah and the IRGC. The second amended complaint, in its unredacted fashion, is replete with allegations of SCB's and other banks' support of both parties. It's letting the sort of tail wag the dog if, because of the PO, now I can't know anything about Standard Chartered's alleged support for Hezbollah or the IRGC.

MR. FINN: Your Honor.

THE COURT: Yes, go ahead.

MR. FINN: If I may?

Normally a plaintiff does not get discovery to formulate a complaint. That's the rule in the Second Circuit. That's the rule that always is here. It's always the situation that the plaintiff doesn't have access to, you know, all of the records of the defendant when having to formulate a

complaint. You know, the only reason we're in this, this, you know, mess is, you know, what plaintiffs did here. And that's what -- that's putting these redactions in an amended complaint without permission to actually use the material.

I will also say that there was a -- we got a subpoena in the *Bartlett* case years ago after the claims here were dismissed and it was negotiated based on, you know, assertions and representations to Standard Chartered Bank from the plaintiffs and counsel there that, you know, here are entities that we think are relevant to our *Bartlett* claims against different banks related to conduct that occurred in different countries, you know, and there was a negotiation around, you know, what entity names we would search for in banking records.

And, you know, so to say that they could just fire off a subpoena or a document request, that doesn't happen in normal situations exactly for the reasons as Your Honor started with, in that when somebody normally files a motion to dismiss, you know, particularly in claims like this where the Court has already found and for some subset of the case as the Second Circuit -- or subset of the claim the Second Circuit has already found, you know, there's been no claim stated.

So, you know, the procedural, you know, complexity here is -- you know, it's not a simple issue. You know, we feel that we really have been used in case one, in the other

case where we were a third party and, you know, voluntarily produced documents in response to a subpoena and, you know, because we did that subject to a protective order, that now we're being subjected to all of this, you know, additional discovery here in order to add, you know, some allegations in 47 pages of a 700-page complaint. You know, that's why we objected to it at the outset, is that, you know, there wasn't permission to even have this in a complaint. So I don't really know why we're engaging this.

That said, if the Court is inclined to, you know, pursue this, which I understand the Court is in some sense, you know, I think the appropriate way is to start with the *Freeman II* plaintiffs. You know, I think that we could write a letter to Judge Amon -- in the first instance, Judge Merkl -- you know, teeing the issue up, I think, you know, and then trying to untangle this more.

I mean, we thought that we had resolved it with the orders in the other case, which Judge Merkl's order was months before this, this amended complaint was filed. You know, but plaintiffs want to continue to pursue it, so I guess we'll have to, you know, as you said, go back to Judge Merkl in the first instance.

You know, and in the meantime, I can continue to try to think of ways with our client to, you know, make this as efficient as possible because we would like to move forward

with a motion to dismiss. And we really think that this is really sort of a frolic and detour on what we should be, you know, trying to present to the Court a straightforward motion to dismiss, you know, of an already very lengthy complaint.

THE COURT: Well, let me ask you. I mean, in the vein of practicality, would it make more sense for your client simply to say their -- you know, powder as they say, and just produce the documents and then focus on the motion to dismiss, which you think has merit, and get the case dismissed after all of this other information is revealed? Which as you say, it seems to be just a bunch of bank transactions that they were willing to produce in the *Bartlett* case.

Am I right -- and you don't have to commit to this, but am I right that the only reason you don't want to produce it in this case is because of the fact that the claims have already been dismissed here?

Or maybe because your client is a defendant here? That could be another reason, I guess.

MR. FINN: Yes. Yes, Your Honor.

I mean, our view is that you don't get discovery to formulate a complaint. We've been dismissed long ago and that should be the end of it. You don't really have to get to, you know, the complexities of the protective order in *Bartlett*. You know, that should be the beginning and end of it. You know, I think for us it's doubly troubling to

Standard Chartered that we are being faced with, you know, additional allegations based on the fact that one set of the plaintiffs were able to obtain, pursuant to a protective order, this material in another case.

You know, perhaps what we could do, Your Honor, if it makes sense, is I can confer with Standard Chartered. And I don't know what the view also is of KBC, which is, you know, a separate issue, which -- but, you know, we can confer and try to come up with, you know, a proposal here.

And obviously if we go to Judge Merkl, we would immediately inform the Court so that you are aware of that correspondence with the Court.

You know, perhaps we could find a solution here because, you know, without revealing the contents of what the material is that's actually been redacted, at least the stuff that we've been shown by plaintiffs' counsel, it really doesn't move the needle here.

But I think from a perspective of the Federal Rules of Civil Procedure, this really shouldn't be allowed. But, you know, putting that aside, we could -- if Your Honor prefers, we could, you know, try to find some sort of path forward to get it resolved further, you know, if the Court is inclined to do that.

THE COURT: Okay.

MR. OSEN: Your Honor?

THE COURT: Yes, go ahead. Who is that?

Oh, Mr. Osen. Yes, okay.

MR. OSEN: Just so I think we're all clear, the entirety of Mr. Finn's objection comes down, setting the procedural history aside, to having the Court see what is redacted. The plaintiffs have never argued for disclosing these materials on the open docket. So if Your Honor's original proposal was adopted and we filed a subpoena -- served the subpoena, rather, the defendants motion to quash was denied, the plaintiffs were able to use the material, the way they would, quote/unquote, use the material is simply filing an unredacted version of the complaint under seal.

So all of this discussion today is simply about whether the Court gets to see the materials, the allegations that Mr. Finn has expressed with confidence are irrelevant and do not help or support a claim. Why can't that just be decided on a motion to dismiss with the Court having the benefit of that information, which its then free to dismiss, reject or credit or weigh in whatever way it seems appropriate?

All of this months and months of back and forth is all about preventing this Court from seeing a couple of dozen allegations that are under seal -- I should say, apologies, are redacted and wouldn't any of them be under seal.

THE COURT: What do you think of that, Mr. Finn,

which is Mr. Osen suggesting I simply -- we sort of reverse the order of things, I simply look at the full, unredacted complaint to see if I think the motion to dismiss would be successful?

Although I suspect if I think -- I mean, it's only I guess efficient if I decide yes, the motion to dismiss would succeed still. Although I don't know how -- obviously, the parties who are briefing it would get to see the unredacted or the -- sorry, the now-redacted allegations, correct, Mr. Osen, under your proposal?

MR. OSEN: Yes.

THE COURT: Okay.

MR. OSEN: Obviously with the exception of a few allegations that tie into KBC for which we would need their consent in this case through some form of lifting of the stay so that we could get their agreement here. With that exception, which they've already agreed to procedurally set forth here; that is, they have no objection to us using those limited allegations under seal.

So the only issue then is, SCB obviously has the benefit. We've provided them with the SCB-originated allegations that are redacted so they know what they are. They can, of course, consent at any time both to letting other defense counsel see that, those unredacted allegations, and they can, of course, also consent right this moment to letting

the Court see them. So the process could be achieved by the parties entering into a protective order in this case that would include Mr. Charest and his clients, it could be done by consent of SCB, it really doesn't matter. But all of this is about preventing the Court from seeing these additional specific allegations.

And to be clear about one other point. Mr. Finn is right; the allegations themselves are not in and of themselves inflammatory, they don't involve disclosure of, you know, confidential information about specific clients and so forth. It's not the sort of stuff that's usually even recognized as protected in the ordinary course. These are ten-plus-year-old bank records of third parties. So they're under seal because they were produced under a protective order. But the idea that the Court somehow can't see them, they're simultaneously irrelevant and besides the point, on the one hand, but also it's a prejudice to the defendants for the Court to see them. That doesn't seem to me to make any sense.

So at the end of the day, the Court can evaluate -- this isn't an issue of prejudice or unfair prejudice in front of the jury. The Court can evaluate the allegations that are redacted, credit them, not credit them, regard them as sufficient or additionally supportive of an aiding-and-abetting claim or not. But that should be Your Honor's decision, not based on these sort of procedural

hoops.

THE COURT: So I know, Mr. Charest, you want to speak, but before I let you do that.

I see the defense's argument though to some extent, because there are two issues.

One is the propriety of a party being able to use discovery to bolster their complaint that has already been dismissed. One could say that that's merely, as we've talked about, a quirk of the procedure or timing. But one also could say those are the rules. I mean, that's just how it works. If you didn't have the information before you brought your complaint and it was dismissed, you're out of luck.

The other principle here and the other interest I think that the defense could -- well, certainly Standard Chartered Bank could argue about, is that when they gave the documents over in *Bartlett*, they did have an understanding as to the limits on their use, and I presume they would argue it affected their decision on what to produce or whether to produce. And so there was a bargain there of some sort, if you could call it that, that would be upset by my allowing the use of them in this case, you know, without going back to the original judge in the original context.

So, I mean, I do think that there are two legal principles that are more than just ministerial, I think, or meaningless procedural rules. But I think the defense can

rely on it in arguing that it's not appropriate for me even to consider these allegations until we sort out whether or not plaintiffs should be allowed to use them at all. And so I don't know if I want to proceed as you suggest, the more I think about it, because I don't want to skip over those two considerations.

MR. OSEN: Well, Your Honor -- I'm sorry.

THE COURT: Yes, go ahead.

MR. OSEN: I take the point you're making, but let me take two steps back.

First of all, Judge Merkl's order, which was upheld by Judge Amon, was without prejudice and specifically pondered a commencement of discovery or lifting of the stay in this case, in which case now the parties could go back in the *Bartlett* case. So that's number one.

Number two is that the analysis and the reason the Court I think did that in the *Bartlett* case is because the cases are very different once you have a -- the case law is different once you have a second proceeding that's ongoing because any court has the power to order discovery in its own case.

So I think at a minimum here, we would ask the Court to lift discovery, you know, the discovery stay here for that limited purpose for us to serve the subpoena. Even if the defendant, you know, in addition to moving to quash wants to

go to Judge Merkl or Judge Amon as they deem fit, the sort of starting point here is the lifting of the stay.

And, you know, just one last point to digress. But Mr. Finn is right that the subpoenas served in *Bartlett* were done at a time in which the *Freeman* cases were either stayed or dismissed, depending on which one. But I want to make sure it's clear on the record that there was no attempt on the part of the plaintiffs to sort of use *Bartlett* as a stalking force for some future unforeseeable circumstance where we would be in today with *Freeman II* having an amended complaint granted and so forth, with the Circuit having issued two rulings on just the aiding and abetting and then the Supreme Court granting cert in another case and so forth.

Moreover, the subpoena itself in that case specified that the defendant could limit its production to transactions involving the Lebanese defendant banks. So the fact that SCB happened to produce records that went beyond what the subpoena asked for and did so for its own convenience, again, is not something that should be deployed against the plaintiffs.

Whatever the circumstances are here, it's not because of machinations on the part of the plaintiffs' counsel or misuse. We've done everything according to the appropriate guidelines for the subpoena that was issued in good faith. We raised this issue in a timely fashion with Your Honor. We filed our request with the Court in the *Bartlett* case.

Judge Amon ruled on it only a few days before we were due to file our second amended complaint here. So I just want to make sure that the record is clear on that point as well.

It is procedural messy, we agree, but the bottom line is, the Court should have an opportunity to see the allegations and make its own determination on relevance to the claims and to whether or not they support aiding and abetting. And nothing in this prevents the defendant and Mr. Finn from either moving to quash a subpoena or to make those same arguments on a motion to dismiss.

THE COURT: All right. Let me just revise what I said earlier about the *Stephens* plaintiff joining in on the subpoena or the discovery request.

That probably wouldn't be appropriate just because I don't think previously there was such a suggestion by the *Stephens* plaintiffs and I think right now -- and I think this was your objection, Mr. Finn. Right now I think we're just dealing with the *Freeman* defendants -- I'm sorry, plaintiffs, and *Freeman I* plaintiffs I guess in particular, with respect to these, with respect to this request. Oh, excuse me, II. Boy oh boy. *Freeman II* plaintiffs, I guess, with respect to this request.

At any rate, I think that at this point the *Stephens,* whether the *Stephens* plaintiffs have any right to make the same request or join in the request, I think that

that's not clear, and so I think we should just stick with the parties who are involved -- were involved in the initial -- in the other case as well as in the initial discovery request here, or the motion to amend I should say, or the amended complaint.

I think after all of this I come back where we started in a way, which is I do think I have to formally, I guess, lift the stay to allow the plaintiffs to file the discovery request as well as to file a subpoena. This way, I think we'll eliminate the one condition or one reason that was relied upon in *Bartlett* in deciding whether or not the protective order precluded production of these materials.

And then, in effect, I think, Mr. Finn, it gives you sort of two arguments to make.

One is to, you know, convince or get the *Bartlett* court to say that these records should not be produced or don't have to be produced by your client or the other bank because they're covered by a protective order, or at least a protective order, you know, doesn't allow those same materials to be used by plaintiff.

And then I think the further, you almost want the Court there at *Bartlett* to say even subpoenaing them in another case when the knowledge of them comes solely from having received them already might be an inappropriate use. I mean, it's kind of a but-for analysis, I guess.

And all because I think it will help you in terms of then arguing to me that I should quash any subpoena -- or any discovery request. And if the other bank, KBC, wants to argue, I guess quash the subpoena.

Because I think you have a few arguments and then I think you also have the argument that the discovery shouldn't be produced because the sole purpose of it is to try to amend the complaint and that in and of itself is improper, you could argue, under the Rules.

I think that's the best way to proceed. And in the meantime, I would just talk to Judges Amon and Merkl to explain I guess what the posture is and how it interrelates to my case.

I mean, they can make -- they could make the ruling that the protective order precludes even requesting it as part of discovery in the other case. I think that would sort of foreclose me from taking any other action in a way. That is a hard question to answer for myself.

But it does seem to me, and I said this before, that in the first instance, interpreting the protective order and what it prevents or prohibits is up to the court that issued it, you know, Judge Amon and Judge Merkl. And I think I would be bound by that. If they decide that "use" includes even relying on the information that they received, they request other discovery in another case, then I think I would be bound

by that. I mean, that's at least how I preliminarily see it, but I think I need to hear from them first, and with the condition of the discovery being stayed lifted now.

So why don't we set some deadlines.

And then in the interim, Mr. Finn, if you and your clients and the parties can come up with some agreed-upon resolution, you can certainly do that. You could obviously voluntarily, I think, give whatever information you want to the plaintiffs if you want to just avoid this prolonged legal battle.

MR. CHAREST: May I be heard, Your Honor? Daniel Charest for the *Stephens* plaintiffs.

THE COURT: Yes. Go ahead.

MR. CHAREST: I'm unclear as to what your -- the Court, I think, said we want to be clear that this does or doesn't apply to the *Stephens* plaintiffs and I was -- I'm not sure I understand what that meant and why.

The letter that started this discussion, like, we were listed as a part of the cases that were referenced. It was under the Osen letterhead. But I understood this to be -- us to be part of the request here. And if we're not and I need to send a letter, I can do that. But I just want to be sure that whatever reopening of discovery happens does not exclude *Freeman* -- *Stephens*, rather. *Stephens*. Sorry.

THE COURT: All right. Well, I think -- I mean,

Mr. Finn, you referred to this.

I know you're included in the heading, the "re:" line of this letter, but the letter itself refers to the *Freeman* plaintiffs. I just didn't perceive that you were making the same request.

And I guess then the question is: Can you really do that, I guess given that whatever you know about these records comes from the *Freeman* plaintiffs and we're still figuring out whether or not they can use the information they have to make the request?

MR. CHAREST: I mean, I don't know how -- well, first of all, we can unpack all of that, I think.

I'm not bound by the protective order, number one.

Number two, I've learned about whatever might be in those documents, the facts of those documents, through our discussions in open court. I think if anyone has license to pursue them based on what I know about them, it's me. But I'm not asking for any sort of special, I don't think, dispensation or whatever. But the notion that I couldn't ask for them because another judge might think that the protective order doesn't bind me might be interpreted a certain way, I don't understand how that could possibly be the result either.

I think what I would request is that if the Court is going to lift the stay to allow this limited discovery, that applies to *Stephens* as well. We'll issue whatever discovery,

ask for exactly what was asked for before, and they can object in whatever way they want to object and then there will be a hearing. You know, I think that's -- but to not let us get out of the gate will only cause more disparity amongst the different cases.

And just to be super clear about it, I was doing the me-too letters earlier and I think remember being told not to do that by, I think, somebody. And so, you know, I don't want to -- I'm just trying -- you know, I don't want to lose whatever rights we might have because of the fact that we didn't also file a letter when this has already been addressed in the Court's docket and what is, in my understanding, an extraordinarily pecune procedural question as to whether we join or not. We join. We join.

THE COURT: Well, I mean, the strange thing though is, remember, this is phrased as a motion for a limited constructive discovery of records in plaintiff's possession, and it says *Freeman* plaintiffs respectfully renew the right to essentially subpoena themselves. So that's why I didn't really construe it as being brought on behalf of the *Stephens* plaintiffs.

But I think the potential legal hurdle is the one that you seem to think matters not, and I guess I differ with you on that a little bit. I mean, because all of these discussions really depend in some way on whether or not the

Freeman plaintiffs were allowed to use in any way and reference in their complaint and perhaps otherwise, maybe even in their letters, this discovery that they claim will help bolster their aiding-and-abetting claim in this case.

And I think the problem is, this is information that you only, you know, the --- being directed, I guess, to these records and to these parties is only known to you because of the *Freeman* plaintiffs using -- again, using the term loosely -- using their knowledge of it to make these requests, this self-subpoena request or self -- constructive self-discovery request.

So that's why I'm troubled by just letting you latch onto it. Because until I resolve -- or until the *Bartlett* court resolves, and then I guess I might have to further opine about, the question of if this information can be requested at all here, it doesn't seem to me appropriate to let you do so as well.

Which is not to say you will be barred from doing so, but the question is whether or not you are really the movant, can be the movant in this first instance and whether or not I should lift discovery for that purpose for you, for *Stephens*.

MR. CHAREST: As a pragmatic, what's going to happen there, right, is then *Freeman* files their discovery, they get whatever they get in discovery, there's no fight about that,

once pass. And then there's a fight in the other case about the interpretation of the protective order and then that gets done. And then at that point I get to hopefully issue my own discovery because we did conclude that all these other issues don't apply.

You know, and so rather -- I mean, how about I just send a letter asking to reopen -- open discovery for a limited purpose that's been disclosed in public records, right? This is not private, the letters that are on file. And ask for that, that right.

And then for all these cases, discovery is open for that limited purpose. And then we're all on the same track, at least, and we can argue about what's next.

But, you know, if we don't get out of the gate here, we are adding in a six-month minimum window for this because I'm going to have to catch up. And then the Court's not going to want to hear their motion to dismiss and my motion dismiss later. You know, be done at the same time, and so we have to catch up eventually. Or not at all. You know, but I mean, that's -- you know, like if it doesn't come in, I guess it's not an issue, it's not an issue. But like, we'll never know until we get to the end of this. And if we don't start this race at the same time, it's just more delay.

THE COURT: Well, if I'm not mistaken, your complaint does not contain any of this information that's

under the -- well, you don't know, I guess.

But your complaint, it hasn't been amended and you're not relying on anything in the *Freeman* plaintiffs' amended complaint?

MR. CHAREST: That's not exactly correct.

We did amend our complaint. We just did not have a bunch of redactions because I don't know what's redacted.

THE COURT: Okay.

MR. CHAREST: So I know that this, you know, honey pot of documents exist based on all these letters going back and the discussion here. And I sure would like to see them in order to add them in, but I don't have enough information to do that. So that's where I'm at.

And, you know, we talked about, again, you know, the rules in the circuit are we can't open discovery after dismissal. It doesn't apply to us. And we don't have the product -- you know, the understanding of the reasons for their production or the reasons they made. All I know is that these things exist and I haven't asked the Court yet. I'm more than happy to do so here. I'm happy to send a letter that I could discovery as to just that production and bring it into my complaint, too. And then, you know, that's a procedural part. Boom. That can be done in a heartbeat.

But one of, I think, the goal is here, is try to and level-set all of these cases so that the Court can actually

look at the complaints, make a ruling on the merits, and then go. Like, you know, every time we sort of re-jigger the beginning part, that gets pushed back by another six months and I really don't want to do that moving forward.

THE COURT: Well, let me ask you, Mr. Finn.

I mean, do you have any objection to the *Stephens* plaintiffs being able to conduct discovery, since they haven't had a complaint dismissed, obviously, and I think the argument would be limited to whether or not they can make discovery requests based on what has been discussed I guess in these open filings about some additional information that could be useful in the possession of your client and KCB?

MR. FINN: Your Honor, I think that goes back to, again, the basic principle not only that you don't get discovery to revive a dismissed complaint, but there is another equally strong rule in the Second Circuit. And we cited a case, *K.A. v. City of New York*, a Southern District of New York case, that cites, you know, a series of cases that say -- and, you know, I'm quoting here -- that courts have, quote: Consistently denied discovery requests which are lodged for the purpose of obtaining extra information prior to amending a complaint. The case goes on to say -- and this is supported by a plethora of case law that that case cites -- the Federal Rules of Civil Procedure require plaintiffs to state a claim upon which relief may be granted without access

to information that is in the defendant's sole control. You don't get discovery to formulate a complaint.

And really, you know, going back to the *Freeman* plaintiffs counsel's point that, you know, well, this is all just sort of trying to prevent you from seeing information. The only reason we're here right now is because the *Freeman* plaintiffs ignored Judge Merkl's ruling and put these redactions in this amended complaint. The Court in *Bartlett* said very clearly, both the Magistrate Judge and the District Judge, you can't use this for another case. And maybe circumstances will change such as through discovery, but I will say, I think what was being contemplated there was following a motion to dismiss, the normal practice that we've been following in these cases since the beginning and what we thought we were going to follow as well.

So, you know, we do object to *Stephens*. You know, again, I'll repeat my objection to the premise of even the -- even of the *Freeman* plaintiffs, you know, getting to make a request. Because the whole basis of the request was putting in these redactions into the complaint, that they say we got this stuff from *Bartlett* after the Court at *Bartlett* says you can't use this stuff. So it's sort of -- you know, they've ignored a court order over in *Bartlett* in order to, you know, put this in front of the Court, you know, and now recognize -- you know, it's a difficult situation for the Court, obviously,

because, you know, now you have these phantom allegations in front of you, you know, under redactions.

But, you know, I do think that if we're going to proceed, you know, to explore whether that was appropriate in the first instance in the *Freeman* cases, that, you know, we should do that first. And as a practical matter, if that gets resolved and we keep these all on the same -- you know, on the same track, I think we can address the *Stephens* case.

I mean, by the way, there are other cases that are, you know, stayed in the Eastern District that are related as well.

So, you know, I think we can focus on, you know, just the plaintiffs who have access to these materials that we think, you know, the premise of this discovery request here is improper, deal with that first, and, you know, we can sort out the *Stephens* situation differently.

But I would say that I think putting aside what's been done in this amended complaint with these phantom redactions, if the plaintiffs just came and say we want some discovery of Standard Chartered Bank, a defendant in this case, when we've already indicated we're going to move to dismiss, and by the way, absent the *Bartlett* issues under the original schedule we would have moved to dismiss, the schedule that the Court set back in June, you know, we wouldn't be here. I don't think that normally a court would say, yes, now

we will engage in discovery of any party.

THE COURT: Right. I think Mr. Finn is correct.

And this is certainly an odd set of circumstances, but the general principle that a plaintiff doesn't get discovery when faced with a motion to dismiss to try to save it from that motion to dismiss applies as the general rule. And maybe even saying even if there's no motion to dismiss and -- well, I guess, actually, let me take that back.

Where there's a motion to dismiss which basically says the complaint is insufficient, if the plaintiff themselves says, well, we can amend and fix it based on what we know now, I let that happen. And that has happened with respect to *Stephens* and with respect, in part, to the *Freeman* plaintiffs. The further step of saying, well, we would like to also get some discovery so that we can further bolster our claims against this motion to dismiss is something that is not generally permitted.

And so I think that Mr. Finn is correct, that if we didn't have this weird quirk where one of the plaintiffs in a similar case already has the information, possesses it, and it's not solely in the possession of the defendant and wants to be able to use it or would have used it to amend their complaint but can't because of -- right now because of a protective order that applies to it, I think that's a slightly different circumstance and certainly one that sort of

straddles this rule to some extent. I mean, they possess the information, but they're not really able to use it or unclear if they can use it.

So I think that positions the *Freeman* plaintiff better to at least make the argument that they can make these discovery requests, which are really just kind of a fig leaf because they already have the documents, but it's using the process. It's using it as a vehicle to see if they can use it because they already have it. And we need to get a ruling then from the other court that had this restriction on it, on whether they can use it either to make the request or to get the documents.

But that really doesn't apply to your case, Mr. Charest. And so I think it's better just to -- for the *Stephens* case, you filed your amended complaint, there has been a motion to dismiss filed, there's a good chance that everything will have to be re-jiggered or reassessed when we resolve this other issue about the information that the *Freeman* plaintiffs possess but are not quite, oh, they don't have the authority yet to use, or maybe they don't even have the authority to request it through discovery in their amended complaint.

And so once we sort that out, I agree with Mr. Finn that we can then see if that affects, and if so, how, the *Stephens* plaintiffs or in a different posture.

So let's set some deadlines to get this process going.

You said, Mr. Radine, that you could file your discovery request to SCB, I think, in ten days and a subpoena to KCB at the same time, I assume. That will, in effect, signal the reopening of discovery, which I am lifting, partial lifting of discovery, of the stay on discovery. Sorry.

And then, Mr. Finn, I am going to count on you to tee up the issue before Judge Merkl and Amon if you think it's appropriate.

You could obviously go the easier route, perhaps, or less litigious route, and just come up with some arrangement to provide the documents to -- or re-provide them or decide which documents they can actually use in their amended complaint. But if you don't, then I want you to file a letter with I guess -- I'm trying figure out who now.

Well, you'll move to quash the discovery request or not respond to the discovery request, but I'd say simultaneously you should file a letter with Judge Amon and Judge Merkl.

I'll give you, I don't know, two weeks to do that after the discovery requests are propounded. Does that make sense? So 10 days plus another 14 days. Does that sound good?

MR. FINN: That's fine, Your Honor.

THE COURT: Okay.

And then, like I said, I am actually going to talk with my colleagues about this issue just to get some sense of what they're thinking. I obviously am not going to make the decision about whether they think even asking for the documents is a violation of the protective order or whether or not the actual obtaining of the documents would be a violation of the protective order. Obviously, they can independently decide that. But it will inform me to some extent.

And then the plaintiff will have the ability to argue further.

So I'm trying to think of how this will work out. I guess you'll simultaneously file your request with the *Bartlett* judges to decide that issue, but file I guess a letter brief, and you can make it up to ten pages on why I should not -- why the discovery request should be denied and the subpoena.

I don't know if KCB is going to want the subpoena quashed. Or KBC. Or KCB. I keep getting it backwards. KCB. They may not move to quash it. And then I don't think -- I wouldn't say that SCB has standing, I guess, to argue about that even though KCB is subject to the protective order, but I don't think you have a dog in that fight. They can do whatever they want in that regard, I suspect.

So I think then I will give plaintiffs two weeks to

respond.

And any defendants who want to join in, obviously, on -- I mean, I guess, Mr. Finn, you can represent whether or not other parties -- well, I guess they really can't have much of a say in this fight.

MR. FINN: Your Honor, we will try to coordinate with the other appearing defendants to ensure that if we have to file something it will be as streamlined and not duplicative as possible.

THE COURT: Right. Yes, because I think they would join in your argument that the rule doesn't allow a party to amend -- seek discovery for the purpose of amending after a claim has been dismissed. I assume you all join in on that argument.

MR. FINN: Yes. And I think the -- speaking on behalf of the appearing defendants, I think every appearing defendant joined or submission or letter prior to this conference on that exact point.

THE COURT: Okay.

So on I think February 29th will be the date on which Mr. Finn and your colleagues will submit a letter motion up to ten pages.

And then two weeks from then, which will be I think mid-March, probably March 14th, I would assume, since the 29th I think is the end of the month, for plaintiffs to respond.

Now, I realize that we probably won't have any ruling from Judge Amon at that time on the protective order, so I suspect the protective order argument is really probably no more than a sentence, which is that, you know, you've already argued, Mr. Finn, that previously Judge Merkl did find that the protective order was very explicit and clear that the material could only be used for that litigation. But it does seem to me the definition of "use" might require a little more teasing out. Because, you know, does it only apply to actually physically introducing them and relying on them or does it actually prohibit including your knowledge of them to acquire them to use them? And I think that that may require some further argument with Judge Merkl and Amon.

Personally, I could see them agreeing with your reasoning, Mr. Finn, because otherwise a protective order really wouldn't protect much if all a party had to do was subpoena them again. So my same reasoning for why a party can't constructively self-subpoena them to get them, but that's up to you to argue.

All right. You know, quite honestly, if Judge Amon and Merkl rule that even making a request to get them again in another case constitutes use that's prohibited by the protective order, I think that will pretty much foreclose any further argument before me because I don't think I have the ability to go around that way. But obviously that's an

argument that the plaintiffs can make, you know, on a contingency basis, that even if they rule that way for some reason, that that doesn't bind me.

Okay. Is there anything else anything else wants to say?

I know this has been a bit of a winding argument, but it's an unusual set of circumstances and a complicated history, unfortunately.

MR. RADINE: Yes.

THE COURT: Yes, Mr. Radine. Go ahead.

MR. RADINE: Just briefly.

So the motion -- you've suspended, I think, the schedule for motion to dismiss in *Freeman.*

THE COURT: Yes. So *sine die* for now.

MR. RADINE: Right.

And then given that one of the factors for our vacatur motion is the potential futility of the amendment, should that likewise be suspended *sine die* as well?

THE COURT: Yes. Yes, because -- you mean the argument for why you shouldn't be allowed to amend is futility? I agree, that could be suspended as well. Because I won't look at anything in the amended complaint until we resolve this issue.

MR. BOCCUZZI: Your Honor, may I?

THE COURT: Yes.

Mr. Boccuzzi?

MR. BOCCUZZI: Yes, Your Honor.

I think Mr. Radine was speaking not to *Freeman II* with any question of amendment, but back to *Freeman I*, which has been definitively you dismissed it, the Second Circuit affirmed that dismissal, the Supreme Court denied cert, and now the plaintiffs want to make a motion to vacate --

THE COURT: Back.

MR. BOCCUZZI: I'm sorry, reopen/vacate and bring that case back somehow.

So I think that can still be litigated on the schedule Your Honor said.

THE COURT: Yes.

MR. BOCCUZZI: Except for all of this.

THE COURT: Yes. Because I think the opening brief is due the 26th of this month, right?

MR. RADINE: Yes, Your Honor.

But the issue we're raising is that when Your Honor decides whether to vacate judgment to permit amendment, one of the factors Your Honor will consider is whether the amendment is futile. You will be doing it on less than the total of the amended complaint.

THE COURT: Is the proposed amendment in *Freeman I* based on the same information that you're using in *Freeman II*?

MR. RADINE: Right.

THE COURT: Okay.

MR. FINN: Your Honor, if I may here?

THE COURT: Yes.

MR. FINN: They're free to argue in a motion to vacate that if they're permitted discovery they could, you know, amend their complaint, right? I mean, their amendment complaint has been filed here. They have phantom allegations that are redacted. But on the motion to vacate, you know, the arguments can be made, they don't -- you know, I think that's why the Court left that schedule in place when the Court took the motion to dismiss off the calendar for the amendments in *Freeman II* and *Stephens* and left the -- you know, the *Freeman I* on the -- you know, on the schedule.

I do think that we could get moving and briefing on that because those are very distinct issues. The standard for a motion to vacate is, you know, obviously much different than a motion -- even than a motion to dismiss, right? The Court has different factors that are being addressed. And if in the interim there is some change in -- you know, in terms of the *Freeman II* allegations such that -- you know, such that the plaintiffs are somehow allowed to, you know, use discovery in order to amend, then, you know, we can address that.

But actually, I don't think we have an amended complaint in *Freeman I* because the next procedural step is a motion to vacate even -- you know, even before you could get

to that point, you know, are there grounds to vacate a final judgment.

THE COURT: That's correct.

But the question Mr. Radine is suggesting is, and I must confess I don't know the standards exactly for a motion to vacate, but is futility of an amended complaint filing that would file a motion to vacate. If I were to grant the motion to vacate, would it still be futile because then any complaint they bring would still be dismissed, is that a factor in deciding a motion to vacate.

Mr. Radine, you're suggesting it is, that that seems to be the next step.

MR. RADINE: Yeah. So courts have found that a vacatur is inappropriate where the proposed amendment that would follow vacatur is futile, would be futile.

MR. FINN: So that's --

MR. RADINE: We've had the benefit of briefing this before.

THE COURT: Yes.

MR. RADINE: And it is clear that vacatur is inappropriate where the proposed amendment would be futile.

THE COURT: Hang on a second.

But that's the defense argument, right? So if they don't care about relying on that argument or factor, then they could decide not to do that and go ahead with their motion,

right? That would benefit them, not you, that argument. You can't conversely say I should not vacate because it wouldn't be futile. I mean, that's why you're seeking to preserve that argument. But it seems to me the defense wants to simply argue the standards for deciding whether to grant a motion to vacate, perhaps foregoing this argument because it won't be ripe if you will amend.

MR. FINN: Your Honor, while I don't have the exact standard, you know, in mind, I do recall that part of the standard is very extraordinary circumstances.

And, you know, this actually similar issue was litigated before Judge Matsumoto in the *Honickman* case, down after being affirmed by the Second Circuit, and the plaintiffs there sought a motion to vacate. You know, and you need to show really extraordinary circumstances, not just the sort of standard to file a motion to amend, for example, a motion for leave to amend, which of course futility is a big part of that sort of motion. It showed some sort of extraordinary circumstances.

You know, and I think the plaintiffs will be free to argue, you know, that -- whatever they want to argue with respect to extraordinary circumstances here. You know, and they already have a 700-page amended complaint that they filed in *Freeman II*.

So, you know, again, we would like to move these

cases along. I mean, particularly *Freeman I*, which has a -- you know, not only a ruling from Your Honor, but a Second Circuit ruling and judgment which, you know, we'd like to move that one along. And, you know, if there is -- if there happens to be an issue, you know, in briefing, the plaintiffs are free to highlight if they think that something relevant to the issues in *Bartlett*, you know, make a difference to the motion. We don't think it will, but, you know, they're free to argue that.

THE COURT: All right.

Why don't we proceed with the briefing. Because even to the extent that somehow the resolution of the *Bartlett* protective order should just come into play, it may hold up a resolution of the motion, but at least we can get the briefing started. I think that that's a healthy or productive use of everyone's time while we try to sort the *Bartlett* issue out. So I really don't think there is a downside to it.

MR. OSEN: Your Honor? I'm sorry.

THE COURT: Yes. Go ahead, Mr. Osen.

MR. OSEN: Yes. Just to clarify.

You know, to the extent that the defendants are willing to stipulate, again solely for purposes of the motion, that they aren't going to raise futility as a basis for opposing vacatur, then that makes perfect sense. If, as is most likely, since it's an element of the standard, they do

intend to raise futility, it seems to us that briefing this twice is not a good use of the parties' time or of the Court's time.

So again, if they're saying, look, we're not going to raise that issue, we feel it's strong only enough on the procedural basis, then that's fine. But if they're not going to stipulate to that, as I suspect they won't, then I can't understand why we would be doing this exercise until we know whether *Freeman II* is going to be dismissed or not. Because if it is dismissed, that takes care of the vacatur argument in *Freeman I*.

THE COURT: Well, I suspect the defense is thinking that perhaps I will decide it without even reaching the futility argument and they would like to have the chance to put those arguments before me. And putting aside -- I imagine the futility argument might be on both sides pretty pro forma, which is we think it will be futile. Those issues, however, can only be fully resolved once the question about what goes into the amended complaint, assuming it will look just like the one in *Freeman II*, is. But putting that aside, we still think you should not vacate for the following reasons: It hasn't met the extraordinariness standard.

Am I right, Mr. Finn or Mr. Baccuzzi, whoever is fighting this?

MR. FINN: Yes.

Your Honor, you know, I'm just looking at Rule 60(b) as well, quickly. And, you know, you have to show things like mistake, inadvertent surprise, excusable neglect, you know, newly-discovered evidence that, you know, could not have been discovered previously. There's a -- you know, and that goes to this extraordinary nature of it, you know, of relieving someone of a final judgment after it's gone up and been litigated. And of course, aiding and abetting actually was an issue with respect to Standard Chartered Bank in that case.

And, you know, so we haven't seen their motion. You know, we actually don't know what the grounds they're going to argue are. So, you know, seeing their motion, we need to see what the grounds are. The grounds cannot be: We think we have a meritorious claim over in *Freeman II* and therefore you should vacate a final judgment. That's not the law.

You know, but we can argue that without having to get into -- I really don't think we're going to be getting into, in there, in that case, you know, the -- every single allegation and what might be an amended -- further amended complaint. Because the Court has to first determine whether any of these elements of Rule 60 even apply before you even get to the question of is it a -- you know, could you actually plead a meritorious claim, you know, in that case.

THE COURT: Well, what about the newly-discovered evidence prong? I suspect that's what the plaintiffs might be

relying on.

MR. FINN: Your Honor, that is -- it's not the circumstances of, you know, you learn about something years after the fact in another case and you want to revive case one based on that.

Now, if they want to make that argument, we should see it. At least we should be able to see what their argument is. But, you know, having them move to vacate, we'll be able to see that, we'll be able to assess it. And frankly, I don't know what the grounds that they could possibly raise to vacate a final judgment that's been affirmed and denied by the Supreme Court.

THE COURT: All right. I would like to keep to the schedule. I mean, it may be that you cannot -- I don't know if it's true if you cannot fully make your arguments, but then you will have a placeholder which is subject to some resolution that we -- you know, assuming the Court agrees or the *Bartlett* court agrees, here's our argument.

Let's just get this process going because we have a lot of balls in the air right now and I would like to -- if *Freeman I* is going to come back to life, we should try to get everything back on track together, *a la* Mr. Charest's argument.

So let's stick to that schedule. The opening brief is due the 26th and I think the schedule falls thereafter.

Plaintiffs will make their arguments and defendants will respond as per the schedule.

And in the meantime then, as I said before, set a schedule for trying to deal with the amended complaint issue and what will go into it, as well as the related discovery issue, both here and I guess in *Bartlett*. Okay?

So I think that addresses everything we need to right now.

Anything else?

And thank you for that, Mr. Boccuzzi.

Okay. I appreciate everyone's thoughts on this. You know, I don't think there's an easy answer, but I can at least promise you that we will basically try to work through all these issues based on your submissions.

If for some reason there is a problem with the timing, obviously talk amongst yourselves. And if you want to propose an alternative schedule, it's fine by me. Okay?

So thank you, everyone. I really appreciate it. Good seeing everybody.

MR. RADINE: Thank you, Your Honor.

MR. COHEN: Thank you, Your Honor.

MR. FINN: Thank you, Your Honor.

(Matter concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Andronikh M. Barna February 7, 2024